United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. WOODS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 3991

UPON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF FOR THE PLAINTIFF IN ERROR.

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J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE

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STATEMENT OF THE CASE.

The defendant, James H. Woods, was tried on an information containing four counts. In the first count it was charged that he did "then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to-wit, twenty-four ounces of a certain liquor called distilled spirits, and one quart of a certain liquor called whiskey, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes * * * intended then and there by the said James H. Woods for use in violating the * * * National Prohibition Act by selling, bartering, exchanging, giving away and furnishing said intoxicating liquor, which said possession of the said intoxicating liquor by the said James H. Woods as aforesaid was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act * * * . In the second count he is charged with the sale, on the 2nd day of December, 1921, of eight ounces of a certain liquor called distilled spirits to Arvid Franzen. In the third count he is charged with selling, at Seattle, on the 2nd day of December, 1921, sixteen ounces of a certain liquor called distilled spirits

to Arvid Franzen. In the fourth count he is charged with maintaining a nuisance at a certain drug store at 115 First Avenue, Seattle, Washington.

After a trial by jury the jury found the defendant not guilty as to Count I, not guilty as to Count II, guilty as to Count III, and not guilty as to Count IV. In other words, the jury found by their verdict that the defendant did sell the sixteen ounces of distilled spirits on December 2, 1921, to Arvid Franzen, but found that he did not possess the liquor that he sold, which was described in Count I of the indictment and was included in the twenty-four ounces of distilled spirits mentioned in Count I.

ASSIGNMENTS OF ERROR.

I.

The court erred in failing to set aside the verdict in this cause, for the reason that the same is inconsistent in that the defendant was by the verdict found guilty of selling liquor which the jury found by their verdict that he did not possess with intent to sell.

II.

The court erred in taking charge of the trial in the presence of the jury, calling witnesses himself and interrogating them.

III.

The court erred in overruling the motion for a directed verdict at the close of the Government's case, for the reason that it appeared at that time that the prosecution's testimony was largely perjured and that the prosecution was the result of a "frame-up" and it was error to permit the verdict to stand on such testimony.

IV.

The court erred in taking charge of the trial and eliciting from the witness Stites the statement that a bonus was paid to the police department for obtaining evidence against places wherein the proprietor had been on trial before and acquitted, and eliciting the statement from the witness that the defendant Woods had been tried before and acquitted.

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V.

The court erred in calling the witness Anderson to the stand and inquiring what a "bonus" was and eliciting from said witness that a "bonus" was an amount paid to secure the conviction of a person who was believed to have had police protection, the inference being that the defendant Woods was such a person.

VI.

The court erred in giving that part of his instructions wherein it was stated that some one had perjured himself in the case and that he had called the matter of Franzen's testimony to the attention of the District Attorney, and the discussion of this matter in the presence of the jury was improper and highly prejudicial to the defendant.

VII.

The court erred during the trial in the investigation held in the presence of the jury as to the probability of Franzen's having himself committed perjury.

VIII.

The court erred in overruling the motion for a new trial herein.

IX.

The court erred in overruling the motion in arrest of judgment herein.

ARGUMENT.

Bunker, a witness for the Government, testified that on December 2, 1921, he went to Woods' drug store in the Northern Hotel building, in Seattle, about ten o'clock at night; that Franzen was in the store some time before Bunker came in; that Franzen gave him two eight-ounce bottles of alcohol; that he saw Woods break a bottle of whiskey on the floor; that Franzen had a glass in his hand; that Bunker picked up two dollar bills and two dollars and two half-dollars. He admitted that he did not see Woods sell anything or give anything to anybody (Tr. p. 31).

Bowen, a police officer, testified that he was present at the drug store; that Franzen said, "There is the money now on the counter," and that Woods says, "You put it there;" that he took possession of the money; that Bunker handed him the two eight-ounce bottles of alcohol (Tr. p. 33).

F. Semple, a police officer, testified that Franzen had no liquor on his person when he went into

the drug store and that Bunker took two bottles off Franzen in the drug store; that Franzen said, "There is the money on the showcase;" that the money was lying on the showcase. He likewise saw no sale (Tr. p. 34).

Anderson, another witness, also said that he saw no sale made. He testified that Franzen was searched before he went into the drug store and that two bottles were taken off Franzen in the drug store; that he saw nobody sell any liquor and that he did not see the money (Tr. p. 35).

Arvid Franzen testified that on December 2, 1921, he was a stool-pigeon, employed by the prosecuting attorney; that he went to Woods' drug store about seven o'clock in the evening; that he asked Woods if he had any alcohol for a spirit compass and he said he had; that he bought a small bottle of alcohol, about eight ounces, and paid a dollar for it; that he went back about ten o'clock in the evening—the time testified to by the other officers—and asked Woods if he had some more of the same kind of alcohol; that Woods gave him two bottles of alcohol, and the officers rushed in and took the two bottles from his hip pocket. Two bottles of grain alcohol are here shown the witness and he refuses

to identify them (Tr. p. 38). He testified that the officers "got mad" when they couldn't find any money on Woods and couldn't find any money in the till; that he went out of the drug store and had the marked money in his hand; that he went in again with it and handed it to Bunker. He denied that he told anybody the money was on the counter. He said that he said to Bunker, "Here is the money," and put it in Bunker's hand. He testified that the money was never out of his hand and he did not give Woods any money (Tr. p. 39).

On cross-examination Franzen testified that early in the evening he went down and asked Woods for some alcohol for a spirit compass, and that Woods put something in the alcohol, poured it out from another bottle. He testified also:

"After we got back to the dry squad room I said, 'Woods didn't get the money,' and Bunker said, 'I know that, but you have to say he did so we can stick him. We won't be able to stick him unless you do.' The bottles I got from Woods that day I have them with me now. (The bottles marked for identification Defendant's Exhibits 'A,' 'B' and 'C')" (Tr. p. 40).

These three bottles contained medicated alcohol and carried on their face the label "poison," and the formula.

Franzen further testified:

"These are the three bottles that I bought there that day. They are in the same condition as when I bought them, except the liquor has been emptied out. I told Mr. Allen (the assistant district attorney who was prosecuting the case) in February that I had emptied the liquor out, and that the bottles they had as evidence were not the ones I got. Mr. Allen sent for me on the 13th of February, and I told him then that I would not stand for any framing up of Woods and unless I could testify truthfully I would be a better witness for the defense than I would for the prosecution, that they had tried to make me testify the way they wanted it. I told them I had three empty bottles at home, and the bottles at home were the ones I bought from Woods and the ones the dry squad had were not the ones I bought from Woods. When I bought them I made a jocular remark about sailors drinking the spirits out of compasses, and Woods said, 'If they drink that it will be the last they will drink.' He said that when he sold it to me" (Tr. pp. 40-41).

"Early that evening, I was waiting for a man named Stites—I was told to work under Stites—Anderson said to me, 'Do you know Jimmie Woods?' I said, 'No.' The name didn't strike me at the time. He said, 'Do you know the Northern Drug Store?' I said, 'Yes.' He said, 'I want you to go down there and make a buy from that son-of-a-B. He got Keefe and I want to get him before he gets me.' Keefe was one of the dry squad. Nobody searched me before I entered the drug-store. I was never searched while I was in the employ of the authorities, this night or any other time. The second time I was in the drug-store I never gave any money to Woods. The bottle broken on the floor was broken by Bowen or Bolton, I am not sure. I was in the drug-store alone when I bought the first bottle for the spirit compass. I brought it back to the dry squad room but did not turn it in. I have had it in my possession ever since" (Tr. p. 41).

"I took these bottles and whatever packages of salts we had and destroyed all of it on account of having those little children at home. The youngest is not yet six. I have six children at home. These three bottles are the only ones I got from Woods' drug-store that day. I poured the liquor out the

same time I poured out the Epsom salts. In the District Attorney's office yesterday, Mr. Allen asked who was the leader, who had started this trial, and Anderson spoke up and said he guessed he was, and when he had got a little further along in his testimony and came to me being searched, I asked Mr. Allen not to pay any attention to Anderson, that he was committing perjury, that I had not been searched. We had a few words over it and I refused to say anything further in there and told Allen to let me see the affidavit that I had signed but had never read. I made notes of that on the back. After they couldn't get anything out of me to compare with the testimony of the police officers, I said I would like to be excused. Allen said, 'Can't you fellows get together in an amiable way and bring this thing out?' He said he had a good case against Woods if we would all come in and tell the same tale. It is my experience that they frame testimony in these cases right along (Tr. p. 42). I have a book here that I bought when I went to work for the dry squad, with certain places I was told to knock over. I was told they were no good and I marked them so. I was offered a bonus for giving testimony to convict Woods. I was paid twenty dollars for it and Stites grabbed five of it.

I got twenty-five dollars bonus, and Stites got five of it. Lt. Haig of the dry squad gave me ten dollars as a bonus, and probably two or three weeks after the raid Stites came and pulled out two five-dollar bills and said that patrolman Keefe had given him ten dollars, and handed me five. When I came back from British Columbia, probably a month after that, Keefe said, 'How much do I owe you, ten?' And I said, 'No, five.' I got twenty dollars bonus in addition to my salary and they gave Stites ten dollars. I was only on the job a few days. I quit because I wouldn't stand to work at that class of work—to frame people. I worked fourteen days. I never drank out of a glass like that down at Woods' place. I told the prosecuting attorney that the bottles I purchased from Woods were at home and that I had poured out the contents. I told Mr. Allen that it was a frame-up and told him the bottles I purchased from Woods were at home" (Tr. p. 43).

A. B. Stites testified that he was present at the drug store; that he saw Woods hand two bottles to Franzen; that he saw Franzen take a drink from a glass; that he saw no money on the counter (Tr. p. 49).

On cross-examination (Tr. p. 49) he testified that he gave Franzen a bonus of twenty dollars. "I got twenty dollars from Capt. Haig; he gave me the bonus and I gave it to Franzen" (Tr. p. 50).

On redirect examination the court asked the witness what the bonus was given for.

"A. I have to tell of one case of that—

Mr. DORE.—Some other case he wants to tell about.

A. Whenever they have beat them before, they have to offer a bonus to get that bootlegger.

The COURT.—I want to know what the bonus was for, for the purpose of giving testimony to establish a fact which is not true?

A. No, sir, it was not.

Q. (By the COURT.)—What was the object of the bonus?

A. If he made a buy and got the information on this man, he got the bonus.

Q. (By the COURT.)—If he didn't get it, what then?

A. He was paid his regular salary.

Mr. DORE.—That is pretty bright.

WITNESS.—He was under pay anyway.

Q. (By Mr. DORE.)—He was under what?

A. Five dollars a day.

Q. (By the COURT.)—Then, if a man is convicted, then he gets more?

A. On this one buy, yes. On certain places there is a bonus on it. Ranges from five to twenty dollars'' (Tr. pp. 51-52).

In the presence of the jury the court made the following statement:

The COURT.—"I want to make this observation: I think, in view of the testimony of this man Franzen upon the witness-stand to-day, that there is a matter here that ought to be examined into by the County grand jury, and a matter here that should, perhaps, get the attention of the Federal grand jury when it is convened. I wish that your office would see that this matter is called to the attention of Major Douglas, the county attorney, and I wish the jurors—the notes are being taken here—the testimony is taken in shorthand and this can be extended and transcribed, and the matter

ought to have the attention of the Federal grand jury, and I will so direct" (Tr. p. 52).

Jacobson, the City chemist, testified that the contents of Government's Exhibits contained thirty-nine percent of alcohol and could have been used for beverage purposes (Tr. p. 53).

O. R. Bolton testified that he was a police officer; that he went to Woods' place of business at ten o'clock; that Woods came towards the front of the store; that he saw two bottles taken off Franzen; that he also saw a broken bottle that had once contained whiskey; that he saw the money on the showcase; that Franzen pointed to the money and said, "Right there is the money" (Tr. pp. 53-54).

The Government then rested (Tr. p. 54), and the court asked the witness:

"Mr. Bolton, did you get a bonus to come in and testify?

A. Absolutely not.

The COURT.—In this case?

A. No. sir" (Tr. p. 54).

The court then asked to have the witness Anderson called in, whereupon the witness Anderson testified as follows:

(Questions by the COURT.)

"Q. Something was said about a bonus that has been paid to some persons. Did you get a bonus?

A. No, sir.

Q. —to testify in this case—anything with relation to a bonus?

A. No, sir.

Q. (By Mr DORE.)—You know the bonus is paid, don't you?

A. Lots of times money is paid these fellows extra for getting places that is noted for being protected by the police.

Q. Haig pays them extra for getting places noted for being protected by the police?

A. Yes, sir.

Q. (By Mr. ALLEN.)—Mr. Anderson, does that have relation to your testimony, or your work as investigator?

A. We don't have anything to do with those bonuses" (Tr. p. 55).

A. B. STITES, recalled for further examination by direction of the Court, testified as follows:

(Questions by the COURT.)

"Q. I want to ask you whether this bonus that you testified about a while ago, whether that obtains to the police officers?

A. No, sir.

Q. To whom does it apply?

A. Why, the agent that made the buy there.

Q. Just to him and to him alone?

A. To him alone" (Tr. p. 56).

Woods, the defendant, testified that the bottles marked Defendant's Exhibit "A," "B," and "C" were sold to Franzen; that formula number one is bichloride of mercury one part and alcohol two thousand parts, and that it is one of the formulas prescribed by the Government. He denied that the bottle of whiskey belonged to him. He testified that when policeman Bolton was down in Judge Dalton's court room, when he was being tried for extorting money from Japanese that he (Bolton) said he was sorry for having brought the bottle in to Woods' place; that Bolton was being tried along with officer Bowen, and they both told him they were sorry they had brought the bottle in (Tr. pp. 56-57).

Woods testified on cross-examination:

"I sold Franzen two bottles of medicated alcohol at ten o'clock. I got five dollars from him for the two bottles. I put the money in the cash register. Franzen said he wanted it for a spirit compass" (Tr. p. 57).

It is conceded that the twenty-four ounces of liquor described in Count I (the possession count) was composed of the sixteen ounces which Franzen contended that he bought at ten o'clock and the eight ounces that he bought at seven o'clock. The sale count (Count III) describes the sixteen ounces that Franzen claims he bought at ten o'clock. The jury by their verdict found that Woods did not possess the sixteen ounces of liquor described in Count I that he is alleged to have sold in Count III.

It must be borne in mind that Woods is not charged in Count I with the possession of the distilled spirits alone; he is charged with having possessed twenty-four ounces of distilled spirits or alcohol, with the intention of selling the same, contrary to the National Prohibition Act. The jury by their verdict found that he did sell the sixteen ounces, contrary to the National Prohibition Act.

The first question for determination in this case is, whether the verdict that finds a defendant sold certain described liquor, and also finds that he did not possess the identical liquor with the intention of selling it—though the jury found in fact that he did sell it—is consistent or inconsistent. It is the contention of the plaintiff in error that the verdict is void on account of inconsistency; that a man cannot be guilty of selling liquor and be innocent of possessing the identical liquor with the intention of selling the same.

In the case of *Rosenthal vs. United States,* 276 Fed. 714, this court held that where one count of an indictment charged a defendant with having bought or received stolen property, with knowledge that it was stolen, and another count charged him with having the same property in his possession with like knowledge, were based on the same transaction, and the evidence showed only one transaction, a verdict finding the defendant not guilty on the first count and guilty on the second count was wholly inconsistent and required a reversal. In that case the court says, at page 715:

"The difficulty is that there was but one transaction involved in the two counts of the indictment,

which was based upon the statute mentioned, and, according to the evidence, but one transaction between the plaintiff in error and the thieves. By its verdict upon the first count of the indictment the jury found that the plaintiff in error neither bought nor received the cigarettes from them with knowledge of the theft, and by its verdict upon the second count that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting."

In the case of *Baldini vs. United States*, 286 Fed. 133, this court, referring to the *Rosenthal* case with approval, said:

"Counsel for the Government rightly concede that, if the two counts related to the same transaction, the position taken on behalf of the plaintiff in error is valid" (p. 134).

A case exactly in point is *Kuck vs. State,* 99 S. E. 622. It will be seen that the *Kuck* case is a case where the defendant was found guilty of selling liquor. Quoting from the decision:

"The offense of having, controlling, and possessing spirituous liquors in this state, as alleged in

the second count, could be committed without making a sale of the spirituous liquors; but the offense of selling, which contemplates delivery within the meaning of the prohibition statutes as the culminating feature of the sale, could not be committed without having, controlling, or possessing liquors. There would be no inconsistency or repugnancy in the verdict of guilty under the second count and not guilty under the first count, but there would be inconsistency and repugnancy in a verdict of guilty under the first count and not guilty under the second count; for, if there were no 'having, controlling, or possessing,' there could be no 'selling.' In the latter instance the repugnancy is as complete as in the case of *Southern Ry. Co. vs. Harbin,* 135 Ga. 122, 68 S. E. 1103, 30 L. R. A. (N. S.) 404, 21 Ann. Cas. 1011, where on account of repugnancy a verdict was set aside. The verdict found damages against the railroad and no liability against its employe in operating the engine of the company."

2 Bishop New Criminal Procedure, sec. 1015a (5):

"No form of verdict will be good which creates a repugnancy or absurdity in the conviction."

16 Corpus Juris, sec. 2596-5:

"A verdict on several counts must not be inconsistent."

Other examples of where inconsistent verdicts were not allowed to stand are:

Commonwealth vs. Haskins, 128 Mass. 60.

State vs. Rowe, 44 S. W. 266 (Mo.).

Toben vs. The People, 104 Ill. 565.

Southern Ry. Co. vs. Harbin, 68 S. E. 1103 (Ga.).

Sipes vs. Puget Sound Electric Co., 54 Wash. 55.

Doremus vs. Root, 23 Wash. 710.

It must be borne in mind that under the National Prohibition Act a druggist cannot possess alcohol legally unless he holds a permit from the National Prohibition Director. There is no testimony in this case that Woods ever had a permit. If he was in possession of any unmedicated alcohol, as the Government contended, under the condition of this record he possessed it illegally, as the burden was upon him to show his license to possess it, which he failed to do. At no place in the record can any mention of a permit be found. The mere fact that Woods was a druggist gave him no authority, under

the National Prohibition Act, to possess alcohol. He must possess it under a permit. The burden is upon him to show that he has a permit. This fact was overlooked by the trial court in his memorandum decision denying a new trial. His decision is fallacious for another reason; because the twenty-four ounces of liquor mentioned in Count I of the indictment is the identical liquor that the Government contends he sold to Franzen. Under the National Prohibition Act he could not sell any alcohol, such as Count I alleges was sold, unless Franzen presented a prescription; and the record contains an affirmative denial that Franzen had a prescription. So that, if the liquor was sold at all, as the jury found it was, then the possession was for the purpose of sale, as a man is taken to intend the thing that he does.

It is absolutely impossible to find any reasoning of law to support the finding that a man sold a quantity of liquor, and a simultaneous finding that he did not possess the liquor that he sold with the intention of selling it. The sale, if it did take place, was an indication of possession. Here again the trial court was in error in overlooking this fact. The memorandum decision of the trial court itself

concedes that the liquor described in Count I and the liquor described as the subject of the sale in Count III is the identical liquor.

The statement of the court in his memorandum decision, that the defendant admitted having alcohol, but being a druggist he could lawfully possess it, and that the jury was so instructed, is erroneous. No such instruction was given, and the statement that a druggist can lawfully possess alcohol, under the condition of this record, is also untrue; because a druggist can only possess liquor when he has a permit to possess it, and then can only possess it in the quantity described in the permit, and the burden is upon him to show such a permit.

Even if a druggist had a permit to possess one hundred gallons of alcohol, and he made a sale of one hundred gallons without a prescription, the fact that he had a permit would not render him guiltless upon a charge of possessing alcohol with the intention of selling it. The fact that he sold it would prove his intent, and possession for such a purpose would not be lawful, permit or no permit. So, upon any consideration of the matter, the court is in error.

The verdict should not be permitted to stand for another reason: There was no evidence that Woods ever sold any liquor, except the testimony of Franzen. Franzen denied that he bought the liquor from Woods that the Government contends was sold to Franzen. The alcohol that Franzen testified that he got from Woods it is admitted was unfit for beverage purposes. The alcohol that the Government contends he bought was fit for beverage purposes. Franzen said he did not buy the alcohol that the Government contends he did buy—alcohol fit for beverage purposes. There was no evidence in the case whatsoever that contradicted Franzen in any particular.

It is true that Stites said he saw Woods pass some bottles over the counter and saw Franzen pass something to Woods. This is not in conflict with Franzen's testimony, that at the time mentioned Woods handed him two bottles of medicated alcohol, unfit for beverage purposes. A search of the record fails to disclose any testimony other than Franzen's as to what Woods gave him. It is impossible to look at this record and find any testimony to support a verdict of guilty of the sale of alcohol fit for beverage purposes.

The utmost that the defendant in error can claim that the record shows is a conflict between the testimony of Franzen, in minor details, and that of the other Government witnesses. Calling the Government's witnesses by name, Bunker testified positively that he did not see any sale; Bowen testified that he did not see any sale; Semple testified the same way; Stites testified the same. The only other witnesses that the Government had, outside of Franzen, testified the same way. It is true that Stites testified that he saw Woods pass some bottles to Franzen, and he saw Franzen pass something to Woods. Franzen testified that Woods passed him something, but save that they were two bottles of medicated alcohol, unfit for beverage purposes. Where is the testimony to support the verdict that Woods, with or without money, passed any alcohol fit for beverage purposes to Franzen? The defendant in error should be compelled to point out to the court where this testimony is in the record.

All of the circumstances of the trial show that it is a verdict that should not be allowed to stand. Franzen testified that the case was a "frame-up" and that he had so informed the district attorney. He testified that the officers had paid him twenty

dollars for giving testimony that would convict Woods. The money was given to him, it is admitted by the witness Stites, his immediate superior. It must be remembered that this money was in addition to his regular salary. Franzen described himself as a stool-pigeon. Certainly where a stool-pigeon is paid money over and above his salary for giving testimony to convict a defendant, and the defendant is convicted on such testimony, the court should be slow to allow such a verdict to stand. Of course the weight of the testimony and the credibility of the witnesses is for the jury, but this is a case that is an exception to any rule.

The court's investigation of the subject of a bonus in the presence of the jury, causing witnesses to testify that Woods had been arrested before and tried and acquitted, and also the statement that a bonus was given for the purpose of rewarding agents who succeeded in making purchases from bootleggers who were supposed to have police protection, was prejudicial to the defendant and had no place in the trial. If the court wished to investigate a collateral matter, the jury should have been excluded. The record shows (Tr. p. 50) at the conclusion of Franzen's testimony, the court tells

the jury that Franzen's testimony should be investigated by the grand jury of both the Federal and State courts, and directs that an investigation be made.

The motion for a directed verdict should have been granted.

For the errors herein the motion in arrest of judgment should be granted or in the alternative a new trial should be ordered.

Respectfully submitted,

JOHN F. DORE,

Attorney for Defendant.

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HON. JEREMIAH NETERER, *Judge Presiding.*

BRIEF OF DEFENDANT IN ERROR

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"The defendant is charged in four counts with violation of the National Prohibition Act. Count 1, charges that on the 2nd day of December, 1921, he unlawfully possessed 24 ounces of distilled spirits and one quart of whiskey, etc.; count 2, that on the same day he unlawfully sold 8 ounces of the distilled spirits, etc.; count 3, that on the same day he unlawfully sold 16 ounces of said distilled spirits, etc., both sales being made to one A. Franzen; count 4, charges the defendant with maintaining a nuisance.

"Upon the trial there was testimony tending to show that the defendant is a druggist, and that he had in his possession 24 ounces of alcohol, and that at some time during the day he sold Franzen 8 ounces of alcohol, and at another time 16 ounces of alcohol. A verdict of not guilty was directed as to count 4. The jury returned a verdict of not guilty as to counts 1 and 2, and guilty as to count 3. The defendant has moved in arrest of judgment on the ground that a verdict of not guilty as to count 1 is an acquital on count 3; and a motion for a new trial upon various grounds, among which, that the verdict of not guilty returned on count 1 is inconsistent with the verdict of guilty on count 3. This is the only ground in the motion meriting consideration.

"*Count 1, charges the defendant with the unlawful possession of 24 ounces of alcohol. The defendant admitted having the alcohol, and being a druggist he could lawfully pos-*

sess it, and the jury was so instructed. Count 2 and 3 charges the unlawful selling. The defendant could lawfully sell alcohol. He contended the sale was lawful. The verdict of not guilty as to the possession merely found that the defendant was not in unlawful possession, and guilty as to count 3 the jury found that he unlawfully sold. The verdict is not inconsistent, and is in harmony with the instructions given by the court, and is not out of harmony with Rosenthal v. U. S. 276 Fed. 714, upon which the defendant relies. The verdict merely finds that the defendant unlawfully sold what he lawfully possessed. The motions are denied."

Defendant, in his criticism of the logic of this decision, is first confronted with the cardinal rule that:

> "An argument based on inconsistency and repugnancy in verdicts is not favored in the law."
>
> *Davey v. U. S.*, 208 Fed. 237 (C. C. A., 7th Cir.);
>
> *U. S. v. Tyler*, 7 Cranch, 285, 3 L. E. 344.

Is, then, the jury's verdict of "not guilty" as to the unlawful possession of the alcohol, when viewed in the light of the testimony and the court's instructions, plainly at odds with its verdict of guilty as to the sale of a portion of this alcohol? We think not. Defendant was a retail druggist and phar-

macist. On the stand he admitted the possession and sale of the alcohol but testified that when he sold the alcohol it was medicated in accordance with one of the formulae prescribed by the Government, viz.: Formula No. 1, providing for one part of bichloride of mercury to 2,000 parts of alcohol and that the bottles bore the "poison" labels required by the Government (Tr. pp. 56 and 57). The witness had reference to Section 61, Regulations 60, promulgated by the Commissioner of Internal Revenue pursuant to authority vested in him by the National Prohibition Act, providing that:

> "Wholesale and retail druggists or pharmacists may medicate alcohol in accordance with any of the seven formulae listed below:
>
> 1. Bichloride of mercury, 1 part; alcohol, 2,000 parts. * * *
>
> (b) Retail druggists or pharmacists may sell such medicated alcohol, in quantities not exceeding one pint, for other than internal use *without physician's prescriptions* * * * provided that in each case the container of such medicated alcohol bears a 'poison' label."

The very gist of the defendant's defense was that, admitting the possession and sale of the alcohol, still as a retail druggist and the holder of a Federal Permit to use alcohol (for he could not lawfully sell alcohol in any form without such permit), he

was authorized by the Regulations above quoted, to possess alcohol and to sell alcohol, in its medicated form, in quantities not exceeding one pint, to any who might desire to purchase. The court recognized this theory of the defense, saying to the jury in its instructions (St. p. 83):

> "You are instructed that the defendant had a right, as a dealer in wholesale and retail drugs, and pharmacist, to sell medicated alcohol in accordance with certain formulas which are listed in the rules and regulations, and the formula under which it is claimed this was sold, under Formula No. 1, that is, by bichloride of mercury one part, and alcohol 2,000 parts."

Plainly, the jury was led to believe, by the defendant's testimony and the portion of the instructions noted, that a druggist might lawfully possess, and under some circumstances, sell alcohol.

Defendant will not now be heard to say that the record discloses a situation making the lawful possession of the alcohol by him impossible. He cannot now, with any semblance of consistency say that he was not the holder of a permit to use alcohol as a druggist. It is true, as counsel argues, that the fact of sale is evidence of unlawful intent in possessing. But this was by no means binding on the jury and as the verdict stands, it is plain that

the jury was more impressed with the contention that the possession was lawful. As remarked by the trial court, "The verdict merely finds the defendant unlawfully sold what he lawfully posessed."

The case of *Kuck v. State*, 99 S. E. 622, cited by defendant, is distinguishable on the facts, the defendant having there, so far as the decision discloses, made no claim of privilege as to the possession and sale of the liquor involved. Of the remainder of the cases cited by defendant as sustaining his position in this regard, *Tobin v. People*, 104 Ill. 565, and *Commonwealth v. Haskins*, 128 Mass. 60, hold that a verdict of guilty of (1) larceny of a chattel and (2) receiving same chattel knowing it to have been stolen, is inconsistent because "in law the guilty receiver of goods cannot himself be the thief;" *Southern Ry. Co. v. Harbin*, 68 S. E. 1103 (Ga.); *Sipes v. Puget Sound Electric Co.*, 54 Wash. 47, 102 Pac. 1057; and *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, hold merely that in a civil action, against master and servant, for damages for a tort committed by the servant, a judgment against the master is inconsistent with judgment in favor of the servant. *State v. Rowe*, 44 S. W. 766, deals with an ambiguous rather than an inconsistent verdict. None of these cases aid in the solution of the point at issue.

We have been able to find no cases more nearly in point than *Gee Woe v. U. S.*, 250 Fed. 428 (C. C. A. 5th Cir.) (Certiorari denied, 39 Sup. Ct. 8; 248 U. S. 562; 63 L. E. 422), *Panzick v. U. S.*, 285 Fed. 871, and *Lowenthal v. U. S.*, 274 Fed. 563 (C. C. A. 6th Cir.). In the *Gee Woe* case, *supra*, it was held that a conviction on a charge of being a dealer in opium without having registered was not inconsistent with an acquittal on a charge of making a sale of opium. In the *Panzick* case, *supra*, an acquittal on a charge of liquor selling was held not inconsistent with conviction of a charge of maintaining a common nuisance contrary to the National Prohibition Act. In the *Loewenthal* case, *supra*, an acquittal on a count charging defendant with having unlawfully obtained morphine for the purpose of sale as a dealer was held not inconsistent with defendant's conviction of the sale of some of such morphine as a dealer without having registered.

We are asked by defendant to point out the testimony which sustains the jury's verdict. Franzen's person was searched before he was sent into defendant's drug store to make the purchase and no bottles or liquor found. Both Anderson and Semple testified to this (Tr. pp. 34 and 36). After Franzen entered, defendant was seen by Stites to pass

Franzen two bottles and the latter to pass to the defendant what the witness took to be money (Tr. p. 49). Franzen then gave the pre-arranged signal that he had made the purchase (Tr. p. 31). The police officers then entered and Bunker took from Franzen two eight-ounce bottles of alcohol (Tr. p. 31) which was fit for use for beverage purposes (Tr. pp. 36 and 53). The marked money previously given Franzen was on the counter and was pointed out by Franzen who said, "There it is; Mr. Woods put it there now" (Tr. p. 35). The defendant himself did not deny the sale but contended only that the alcohol was not fit for use for beverage purposes (Tr. p. 56).

Limited space prevents us from saying all we should like concerning the witness Franzen, who, if his own statement is to be believed, was a stool pigeon and the recipient of fees to give false testimony. Suffice it to say that defendant has no cause for complaint at his testimony. Franzen testified that he "would be a better witness for the defense than he would for the prosecution" (Tr. p. 40), and that this was the case a reading of the Transcript, pages 39 to 43, will show.

The trial court's investigation of the subject of bonus in the presence of the jury is not reversible

error for several reasons: (1) No objection was made to this procedure by counsel, in fact he participated in it (Tr. p. 51); (2) Counsel, in his cross examination of the witness Franzen (Tr. p. 43) and then of the witness Stites (Tr. p. 50), first opened up this line of inquiry.

The court's admonition to the Assistant United States Attorney that Franzen's testimony should perhaps, get the attention of the Federal Grand Jury (Tr. p. 52), was the least the court could have done in view of the fact that Franzen's testimony was directly contradicted by the affidavit made by him in support of the information in this case (Tr. pp. 5 and 6). No objection was made to this by defendant and it is, therefore, not reversible error.

Rossi v. U. S., 278 Fed. 351 (C. C. A. 9th Cir.).

It is respectfully submitted that there is no error in the record and that the judgment should stand affirmed.

Respectfully submitted,

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